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CITY COUNCIL

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May 28, 1996

Mr. Reed E. Hundt
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Ms. Rachelle B. Chong
Commissioner
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

Ms. Susan Ness
Commissioner
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

Mr. James H. Quello
Commissioner
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

In re: Discriminatory Redlining
Failure to Serve by OVS Provider
CS Docket 96-46

Dear Chairman Hundt and Commissioners Chong, Ness and Quello:

As a municipality with the responsibility of protecting the interests of our citizens, we are concerned about claims that OVS providers may be able to selectively choose areas to serve. This could lead to discrimination and redlining by preventing OVS service from being provided in minority, low income, and growing areas of municipalities.

With changes in the law which would allow cable operators to become an OVS provider and the Telecommunications Act allowing telephone companies to buy out cable companies, there exists the possibility that an OVS provider could be the only land-line video provider. Potentially, there could be only one video/data/telephone provider in an area. A monopoly of this sort could easily be discriminatory by failing to serve selected segments of our population.

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A lack of restraints on phone companies could pose similar problems where an OVS provider may claim there is not sufficient population density to warrant service.

As a municipality, we regard this issue as part of the just compensation we receive from cable companies for use of our rights-of-way. The public is entitled to this compensation -- both in moneys and in service to all residents of the city.

We request that the Commission prevent OVS from becoming a discriminatory "redlining" service. We would urge you to adopt the OVS rules recommendations as set out in the attached letter dated May 14, 1996 to the Cable Bureau from Counsel for Michigan, Indiana and Texas (MIT Communities).

In accordance with the Commission's *ex parte* rules, we are providing a copy of this letter to the Secretary for inclusion in the public record.

Very truly yours,



Bob Sokoll
City Manager

cc: Mr. Will F. Caton, Acting Secretary, Federal Communications Commission (2)
Senator Phil Gramm, United States Senate
Senator Kay Bailey Hutchison, United States Senate
Representative Martin Frost, United States House of Representatives
Mr. Blair Levin, Chief of Staff for Chairman Hundt
Ms. Suzanne Toller, Legal Advisor to Commissioner Chong
Ms. Mary McManus, Legal Advisor to Commissioner Ness

VARNUM, RIDDERING, SCHMIDT & HOWLETT^{LLP}

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FCC MAIL ROOM

Ms. Meredith Jones
Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, NW
Room 918
Washington, DC 20554

Re: OVS Rulemaking -- Area Served

Dear Meredith:

Thank you for taking the time to meet with representatives of the Michigan, Indiana and Texas (MIT) Communities last Friday. Your doing so is greatly appreciated.

You asked the communities to respond on the issue of whether an OVS provider has a "universal service" requirement. In summary, we believe that OVS providers are subject to federal and local restrictions on where they serve. This is necessary to prevent discrimination, redlining and "economic redlining" which would result in minority, low income and growing areas of our nation's municipalities from being served by any cable or OVS provider.

We are particularly concerned about this in the situation where the OVS provider is the only land line video provider, which is likely to occur in a substantial percentage of the nation's communities. This could occur, in particular, if cable operators are allowed to switch to becoming OVS providers (and is an additional reason why this should not happen).

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Further detail explaining the preceding points is as follows.

OVS Overbuilding Not Only Scenario: Much of the discussion to date on OVS has implicitly focused on the "overbuild" situation, that is, where an OVS provider would be serving an area already served by an incumbent cable operator. Although overbuilding may occur in some instances (and it has been rare in the U.S. to date) serious concerns from allowing an OVS operator discretion on where and whom to serve arise in the more likely situation of the OVS provider being the only (i.e. - monopoly) land-line video provider. This is discussed next.

OVS the Only Provider: The likely situation in many instances is that the only land line video provider will be an OVS provider. This could occur a number of ways:

- (1) -- The incumbent cable operator switches to becoming an OVS provider. This is particularly likely to occur if the cable provider provides local telephone service. As you know, having cable companies provide phone service was stressed by Vice President Gore in his recent speech to the NCTA convention; was encouraged by the 1996 Telecommunications Act; and now is starting to occur. For example, attached are the first few pages of Continental Cablevision's May 9 application to provide telephone service in those areas of Michigan where it has cable systems. This includes the state capital -- Lansing -- as well as numerous other cities.

It is highly likely that other cable operators in Michigan and other states will follow Continental's example such that they will be local exchange carriers and thus claim that they can switch to being OVS providers.

- (2) -- In many areas, the phone company can buy out the cable company as is now expressly allowed under new Section 652 of the Communications Act (added by the 1996 Act). Section 652 in general allows such buyouts in more rural areas, for all but the largest cable operator in the top 25 television markets, and for certain cable systems outside the top 100 television markets.
- (3) -- In the medium to longer run, the laws of economics (in particular those relating to natural monopolies) may result in there being "one wire" to many subscribers homes which provides both telephone, video and data. This could be the result of either the cable operators displacing the phone companies or vice versa. In either case, the resulting entity will be a local exchange carrier and claim that it can be an OVS provider.

Thus, either by cable operators providing telephone service today or other mechanisms the nation is likely to face large numbers of areas where the OVS operator is the only wired video provider, as opposed to the OVS provider being an overbuilder.

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Redlining/Discrimination: A monopoly OVS provider with no restraints on where and who it serves is likely to discriminate against large segments of the nation's population in the provision of service. These groups -- predominately minorities, low income groups or growth areas on the edge of municipalities -- will either have no video service or distinctly inferior service (as current 1960's or 70's cable systems are not upgraded, while more affluent areas are upgraded to a fiber standard). The reason for the discrimination would be the desire of the OVS operator to focus on more affluent -- and thus more profitable -- areas.

Examples of this could be the following:

- As you are aware in Washington, the cable company has had significant difficulties providing cable service in the Anacostia area. If it is an OVS provider and there are no constraints on where and whom it serves, Anacostia is likely to be left with distinctly inferior cable service, if any at all.
- In Detroit, Dallas, New York, Los Angeles and other major urban centers, the low income inner city areas are likely to not be served by OVS, or again receive inferior service. For example, Detroit has 62% of its population below the poverty line and has only 31% penetration on cable, less than half the national average. The figures and risks for Dallas are comparable. A current example of such redlining comes from San Francisco, where we are informed that the current operator (Viacom/TCI) does not serve certain minority/low income areas of the city (who thus have no cable service) because it claims that it is not required to do so because (according to the operator) language requiring this was not contained in its franchise to serve the city.

These illustrations show how the lack of any requirement on where and who to serve could lead to major discrimination in the provision of OVS services. The resulting harm is particularly great where OVS is the only wired provider.

To prevent these types of problems cable franchises typically contain a density requirement, which if met, requires the cable operator to serve all residents of the area in question. For example, a franchise might require service without any line extension charge by the cable operator wherever there are X dwelling units per mile of street (pro-rated up or down for areas of more or less than one mile).

Municipalities with denser populations typically require in their cable franchises that service be available to all residents, with service to any low density areas being more than compensated for by high density areas.

Finally municipalities have "anti-redlining" provisions in their franchises, for example as directed by Section 621(a)(3) of the 1984 Cable Act. Often such provisions predate or are more expansive in the list of invidious criteria than Section 621(a)(3).

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The problem is equally acute in growth areas and lower density areas towards the edge of urban areas where cable operators (for example) often contend that the housing density is too low for them to provide service. A good example of what could occur comes from Las Vegas, NV where the cable operator refuses to serve much of the growing suburban areas because it claims its franchise lacks any "dwelling units per mile" requirement.

This type of problem is fairly widespread towards the edges of metropolitan areas and in more rural areas where the single biggest cable issue is not cable rates or cable channels, but the inability of subscribers to obtain cable service. Again, municipalities address this problem through density (dwelling units per mile) requirements described above.

In conclusion, there is thus a major risk that without requirements on OVS providers of where and whom they serve, that minority, inner city and growth areas of the nation's municipalities may be left without any kind of wired video service. The numbers in question could be large, e.g. 20-40% of the nation's population.

Control Right-of-Way/Compensation: One element of the compensation which a municipality receives for the use of its right-of-ways is adequate assurance that its citizens will be served and will not be discriminated against. The exact language will vary from community to community, such as the dwelling units per mile or "serve all residents" examples described above. Such provisions affirmatively prevent discrimination based on race, income level, public assistance status or housing density.

The key is that rights-of-way are owned by the public. The public, through the municipality, is constitutionally entitled to just compensation for use of the rights-of-way. Such compensation takes a variety of forms, including not only monetary compensation but requirements such as those set forth above to ensure that public rights-of-way are used to serve the public generally and to prevent their use in a discriminatory fashion. Such provisions ensure that as many residents as reasonably possible are provided service.

Note that the preceding provisions extend not just to who is provided service but are often applied to such factors as the timing of the building (or rebuilding) of a system so that an operator cannot obtain indirectly (by a 15 year build of a 10 mile system) what it could not do directly.

Municipalities thus have the authority, as a part of the just compensation they receive and to prevent discriminatory use of public property, to take analogous actions in the OVS area.

FCC Authority and Rules Needed: For the reasons set forth above, the matter of where and whom OVS operators serve is an issue this Commission must address. Casting the issue as a "universal service" issue is probably not correct because, as the Commission is aware, cable operators currently do not serve all (or nearly all) residents of the United States (in contrast to phone companies, which effectively do provide service to most U.S. residents), and OVS is likely to be more like cable than telephone. It would be very unfortunate if this Commission were to adopt rules which would have the effect, as early as the summer or fall of this year, of allowing

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cable companies to start discriminating against minorities, low income groups or lower density geographic areas as described above.

We thus believe the Commission should, at minimum, do the following in its OVS rules: First, it should set forth a minimum density requirement for service of no more than 10 dwelling units (occupied or unoccupied) per mile of street. All areas meeting this requirement (pro-rated up or down for areas more or less than one mile) would have to be wired for OVS service within two years. An OVS provider could deviate from this requirement only if it has obtained the advance concurrence of the municipality being served, and if such deviation is approved by the Commission in the certification process. Adopting a single standard would provide the OVS providers with a simple, clear test of general applicability, yet would require them to consult with local municipalities -- who without question are most knowledgeable as to local conditions -- in situations where deviations from this standard are warranted.

As an example, municipalities have seen variations in density and service area requirements based upon such peculiarly local factors as terrain (mountains, rivers, lakes), man made obstacles (mining areas, Federal installations), and unique variations in demographics, housing and other residential occupancy patterns.

Second, the Commission should enunciate strong rules against discrimination on invidious grounds analogous to (but more extensive than) those set forth in Section 621(A)(3) of the Cable Act and make clear that any violation of such provisions would automatically result in OVS certification being terminated and the operator becoming a cable operator. An example of such language is attached.

Third, the Commission should take strong action to prevent cable operators from "redlining" cities with large minority populations. For example, it should prevent an OVS operator from electing to serve only the Maryland suburbs but not serving Washington D.C. at all. Actions such as this are essential to see that the nation's major urban centers with substantial minority populations, such as Detroit, Newark and many others are not denied service on racial, invidious or other self-serving grounds, while nearby communities are served. Thus the Commission should require an OVS operator providing service in an area near a municipality with a significant minority or low income population to start providing service to the latter municipality within two years of its starting to provide service to the nearby community (and to provide service to all areas of the minority/low income community within four years of starting to provide service in the nearby community). Only an absolute requirement such as this will prevent OVS operators from redlining many of this nation's cities. If OVS operators wish to have the benefits of relaxed regulation they must accept the burden of strong measures against discrimination.

Municipalities would still be able to act in the certification process or pursuant to the right to obtain just compensation if the result of the preceding were inappropriate for the municipality in question.

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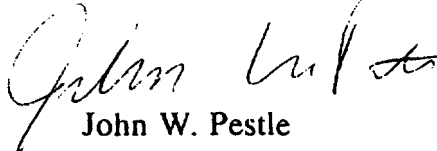
OVS Unavailable to Cable: The reasons set forth above further illustrate why cable operators should not be able to "switch" to being an OVS operator. This would lead to claims on their part that the dwelling units per mile, anti-redlining or other requirements in their franchises no longer apply, with the risks of no cable service or discrimination in service described above.

Conclusion: Again, we appreciate your meeting with us. We believe this issue which you raised is one with serious implications and hope the preceding analysis and recommendation is helpful.

With best wishes,

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT^{LLP}



John W. Pestle

JWP/nk

cc: Mr. Rick Chessen, Cable Services Bureau
Mr. Gary Laden, Cable Services Bureau

EXHIBIT A

Operator shall not fail to provide service, deny service, deny access to service or otherwise discriminate in the area served, availability, quality, content, rates, terms or conditions of service provided to actual or potential subscribers on the basis of race, color, creed, religion, ancestry, national origin, sex, disability, age, location, marital status or status with regard to public assistance. Operator shall comply at all times with all applicable federal, state and local laws and regulations relating to nondiscrimination.